Lee Ah Kong @ Lee Muk Sang v Wings Logistic Sdn Bhd & Anor

HIGH COURT (PULAU PINANG) — ORIGINATING PETITION NO 26–1–01 OF 2013
S NANTHA BALAN J
18 OCTOBER 2013

Civil Procedure — Mode of commencement — Originating summons — Whether after 1 August 2012 proceedings under s 181 of the Companies Act 1965 must be made by way of originating summons and no longer by way of petition — Rules of Court 2012 O 5 r 1 & O 88 r 2 — Companies Act 1965 s 181

Companies and Corporations — Oppression — Minority shareholders — Complaint by minority shareholder of non-payment of dividens — Whether company run in manner oppressive or unfairly prejudicial to minority shareholder — Whether after 1 August 2012 proceedings under s 181 of the Companies Act 1965 must be made by way of originating summons and no longer by way of petition — Rules of Court 2012 O 5 r 1, O 88 r 2 & O 94

In his instant petition under s 181 of the Companies Act 1965, the petitioner ('Lee') sought for, inter alia, an order that the second respondent ('Chew') purchase Lee's 7% shareholding in the first respondent ('the company') or, alternatively, that the company be wound up. The two other majority shareholders cum directors in the company – who held 46.5% shares each at the material time – were Chew and another individual ('Lee'). Chew and Lee subsequently transferred all their shares (leaving one share each in the company) to another entity which both of them fully owned. The company's principal business at the material time was property-holding and investment but its only asset then was a landed property on which stood a bonded warehouse ('the property'). The company's sole source of income was rental of the property. Chew was at all times in full control of the company and the signatory to the company's cheques. The petitioner's grouse was that Chew had abused his powers as a director and ran the company in a manner unfairly prejudicial and oppressive to, or in disregard of, his rights as a minority shareholder. The petitioner claimed, inter alia, that since he became a shareholder in the year 2002, he had never received regular notices of the company's annual general meetings ('AGMs') or audited reports; he had never received annual dividends although the company's annual revenue exceeded RM1m and the directors paid themselves handsome fees and audited accounts showed the company incurred huge operating costs and administrative

A expenses although its sole asset was the property and its sole income was rental of the property. Chew, on the other hand, said independent auditors had never raised any complaints about the company's accounts, in particular, as to the costs and expenses incurred; that the petitioner had only attended three AGMs of the company and thereafter stopped attending on his own accord; that no B dividends were paid to shareholders as the company's funds were used to invest in property purchases (approved at an extraordinary general meeting which the petitioner did not attend despite being given notice) which benefitted all the shareholders in the long run and caused the share value of the company to appreciate to RM9.74 per share. Chew contended that the petitioner's real C objective in filing the instant proceedings was to compel him to buy the petitioner's shares at that value.

Held, dismissing the petition:

D (1) Based entirely on the affidavit evidence submitted by both parties, the court found that the petitioner had not made out a case of oppression or unfair prejudicial conduct under s 181 of the Companies Act 1965 (see paras 150–152).

E (2) As long as it was demonstrated that the company was run in a way that showed that assets were being acquired and monies were being invested wisely, as seemed to be the case here, then the conduct of those having control of the company could not be impugned. No sinister or vitiating fact or circumstance was shown to impel the court to impugn the F decision of the controlling party as being oppressive or unfairly prejudicial to the petitioner. The management of the company in Chew's hands had, without doubt, resulted in an appreciation in the share value of all shareholders including the petitioner. The court could not and should not sit in judgment over bona fide management decisions (see G paras 139, 140, 147 & 148).

(3) Failure to send notices of meetings or failure to declare dividends were not of themselves conduct which could be regarded as oppressive. After 2005 and until 2012, the petitioner did not attend any of the company's H AGMs. There seemed to be inertia on his part. He could have enquired with the company's secretary or with its directors or staff with respect to the AGMs and could have obtained copies of the audited reports from the Companies Commission of Malaysia. As to not having received dividends, the petitioner did not suggest that it was targeted specifically I at him. He went along without having received dividends for almost 10 years and it was rather late for him to complain about it now and say that that was a manifestation of oppressive conduct. The company had invested the excess profits available for distribution into property purchases and the value of the petitioner's shares had appreciated thereby.

This repudiated any notion of oppressive conduct on Chew's part (see paras 122–125, 128–129, 131 & 135).

(4) With the coming into force of the Rules of Court 2012 ('ROC') on 1 August 2012, proceedings under s 181 of the Companies Act 1965 must be commenced by way of originating summons. Notwithstanding that the wrong mode was used in the instant case, the court of its own accord and taking in account the particular circumstances of the case, invoked O 2 r 1 of the ROC to excuse the non-compliance and treat the proceedings as having been properly filed (see paras 3, 11, 14, 19 & 21).

[Bahasa Malaysia summary

Dalam petisyen di bawah s 181 Akta Syarikat 1965 ini, pempetisyen ('Lee') memohon bagi, antara lain, satu perintah bahawa responden kedua ('Chew') membeli 7% pegangan saham Lee dalam responden pertama ('syarikat') atau, secara alternatifnya, agar syarikat digulung. Dua lagi pemegang saham majoriti merangkap pengarah-pengarah syarikat – yang masing-masing memegang 46.5% saham pada masa material – merupakan Chew dan seorang lagi individu ('Lee'). Chew dan Lee setrrusnya memindahkan saham-saham mereka (meninggalkan satu saham setiap seorang dalam syarikat) kepada entiti yang mana kedua-dua mereka miliki sepenuhnya. Perniagaan utama syarikat pada masa material adalah pegangan hartanah dan pelaburan tetapi satu-satunya aset ketika itu adalah hartanah yang mana padanya terdapat bon gudang ('hartanah'). Satu-satunya sumber pendapatan syarikat adalah sewaan hartanah tersebut. Chew pada setiap masa material mempunyai kawalan penuh ke atas syarikat dan merupakan penandatangan cek-cek syarikat. Aduan pempetisyen adalah bahawa Chew telah menyalahgunakan kuasanya sebagai pengarah dan menjalankan syarikat dalam keadaan yang secara tidak adilnya memprejudiskan dan menindas, atau dengan tidak mengendahkan, hak-haknya sebagai pemegang saham minoriti. Pempetisyen mendakwa, antara lain, bahawa memandangkan dia telah menjadi pemegang saham pada tahun 2002, dia telah menerima notis-notis tetap mesyuarat am tahunan syarikat ('AGM') atau laporan-laporan yang telah diaudit; dia tidak pernah menerima sebarang dividen tahunan walaupun pendapatan tahunan melebih RM1juta dan pengarah-pengarah sendiri membayar diri mereka fi yang banyak dan akaun-akaun yang diaudit menunjukkan bahawa syarikat mengeluarkan kos operasi dan perbelanjaan pentadbiran yang besar walaupun satu-satu asetnya adalah hartanah tersebut dan satu-satu pendapatannya adalah sewaan hartanah. Chew, sebaliknya, mengatakan bahawa auditor-auditor bebas tidak pernah membangkitkan apa-apa aduan mengenai akaun-akaun syarikat, khasnya mengenai kos dan perbelanjaan yang dikeluarkan; bahawa pempetisyen hanya menghadiri tiga AGM syarikat dan selepas itu berhenti menghadirinya atas kehendak sendiri; bahawa tiada dividen yang dibayar kepada pemegang-pemegang saham kerana dana syarikat digunakan untuk melabur dalam hartanah-hartanah yang dibeli (diluluskan semasa mesyuarat

am luar biasa yang mana pempetisyen tidak hadir walaupun telah diberi notis) yang memanfaatkan kesemua pemegang-pemegang saham dalam jangka masa panjang dan menyebabkan nilai saham syarikat melonjak kepada RM9.74 se saham. Chew menghujahkan bahawa objektif sebenar pempetisen dalam memfailkan prosiding ini adalah untuk memaksanya membeli saham pempetisyen pada nilai tersebut.

Diputuskan, menolak petisyen:

(1) Berdasarkan pada afidavit keterangan sepenuhnya yang dikemukakan oleh kedua-dua pihak, mahkamah mendapati bahawa pempetisyen tidak berjaya membuktikan satu kes penindasan atau tindakan prejudis tidak adil di bawah s 181 Akta Syarikat 1965 (lihat perenggan 150–152).

(2) Selagi dibuktikan bahawa syarikat dijalankan dalam cara yang menunjukkan bahawa aset-aset diambil dan wang-wang dilaburkan dengan bijak, seperti dalam kes ini, perlakuan mereka yang mempunyai kawalan ke atas syarikat, dengan itu, tidak boleh dipersoalkan. Tiada fakta buruk atau yang membatalkan atau hal keadaan yang ditunjukkan untuk menyebabkan mahkamah mempersoalkan keputusan pihak yang mengawal sebagai menindas atau memprejudis pempetisyen secara tidak adil. Pihak pengurusan syarikat, dalam tangan Chew telah, tanpa ragu-ragu, menyebabkan lonjakan pada nilai saham pemegang-pemegang saham termasuk pempetisyen. Mahkamah tidak boleh dan tidak seharusnya membiarkan penghakiman ke atas keputusan-keputusan pengurusan yang *bona fide* (lihat perenggan 139 & 140, 147 & 148).

(3) Kegagalan untuk menghantar notis-notis mesyuarat atau kegagalan untuk mengisytiharkan dividen-dividen bukanlah atas tindakan mereka yang mana boleh dianggap menindas. Selepas tahun 2005 dan hingga 2012, pempetisyen tidak menghadiri mana-mana AGM syarikat. Kelihatan seperti terdapat inersia pada bahagiannya. Dia boleh bertanyakan pada setiausaha syarikat atau dengan pengarah-pengarah atau kakitangan bagi AGM dan sepatutnya boleh mendapatkan salinan-salinan laporan audit daripada Suruhanjaya Syarikat Malaysia. Berkenaan tidak menerima dividen, pempetisyen tidak mencadangkan bahawa ia disasarkan khas terhadapnya. Dia menuruti walaupun tidak menerima dividen selama hampir 10 tahun dan agak terlambat untuknya mengadu mengenainya sekarang dan mengatakan bahawa terdapat manifestasi perlakuan yang menindas. Syarikat telah melaburkan keuntungan lebihan yang ada bagi pengedaran dalam pembelian hartanah dan nilai saham-saham pempetisyen telah melonjak. Ini menyangkal apa-apa cadangan mengenai perlakuan menindas di pihak Chew (lihat perenggan 122–125, 128–129, 131 & 135).

(4) Dengan pelaksanaan Kaedah-kaedah Mahkamah 2012 ('KKM') pada

1 Ogos 2012, prosiding-prosiding di bawah s 181 Akta Syarikat 1965 mestilah dimulakan melalui saman pemula. Tidak mengira cara yang salah yang digunakan dalam kes ini, mahkamah atas kehendaknya sendiri dan mengambil kira beberapa hal keadaan dalam kes ini, membangkitkan A 2 k 1 KKM untuk memaafkan ketidakpatuhan dan menganggap prosiding-prosiding seperti telah difailkan dengan teratur (lihat perenggan 3, 11, 14, 19 & 21).]

Notes

For cases on minority shareholders, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 689–707.

For cases on originating summons, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5967–5980.

Cases referred to

Balakrishanan Vairavapillai v Pantai Holdings Bhd & Anor [2005] 5 CLJ 83, HC (refd)

Bellador Silk Ltd, Re [1995] 1 All ER 667, ChD (refd)

Five Minute Car Wash Service Ltd, Re [1966] 1 All ER 242, Ch D (refd)

Gee Hoe Chan Trading Co Pte Ltd, Re [1991] 3 MLJ 137; [1991] SLR 837 (refd)

Hoy Pak Kwai (suing on behalf of himself and for Company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors [2007] 1 MLJ 508; [2007] 1 CLJ 121, CA (refd)

Jermyn Street Turkish Baths Ltd, In Re [1971] 1 WLR 1042, CA (refd)

Kong Thai Sawmill (Miri) Snd Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors, Re v Ling Beng Sung [1978] 2 MLJ 227, PC (folld)

Low Tien Sang & Sons Holdings Sdn Bhd v How Kem Chin [2000] 2 MLJ 334, HC (refd)

Mega Education Systems Sdn Bhd & Anor v Ozone Glass Design Sdn Bhd & Ors [2011] 6 MLJ 644, HC (refd)

Pan-Pacific Construction Holdings Sdn Bhd v Ngui-Kee Corp (M) Bhd & Anor [2010] MLJU 269; [2010] 6 CLJ 721, FC (refd)

See Hua Realty Bhd v See Hua News Holdings Sdn Bhd & Ors [2007] 7 MLJ 525, HC (refd)

Sensun Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (folld)

Smith and Fawcett Ltd, Re [1942] Ch 304, CA (refd)

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433, PC (refd)

Legislation referred to

Companies Act 1948 ss 210

Companies Act 1965 ss 6, 62, 6A(4)(c), 6A(5), 181, 181(1)(a), 122A(1)(b), 132(1), 133A, 218

Companies Act 2006 [UK] ss 210, 459, 994

Rules of Court 2012 O 2 r 1(1), O 5, O 5 r 1, O 28 rr 8, 4, O 88, O 94

Rules of the High Court 1980 O 2 r 1(1), O 5 r 1, O 88 r 2, O 94

Daphne Choy (Choy & Assoc) for the petitioner.
Latsamanan (Zakaria Md Saad with him) (Zakaria & Co) for the respondent.

S Nantha Balan J:

INTRODUCTION

[1] Enclosure 1 is a petition filed under s 181 of the Companies Act 1965 for, inter alia, an order that the second respondent, Chew Khoon Aik, shall purchase the entire 7% shareholding of the petitioner in Wings Logistic Sdn Bhd or in the alternative that it be wound up.

MODE OF COMMENCEMENT

[2] Before dealing with the merits of the petition, there is a preliminary procedural point that needs to be addressed.

[3] This petition was filed on 7 January 2013, whereas the Rules of Court 2012 ('the ROC') came into force on 1 August 2012. Hence, the applicable procedural rules are the ROC. The ROC is in pith and substance an amalgam of the Rules of the Subordinate Court 1980 and the Rules of the High Court 1980.

[4] However, it has made substantial changes to the adjectival law in Malaysia, in particular (but not limited to) to the modes of commencement of actions. Under the ROC parties are to file their actions either by way of writ or originating summons, unless it is one of the matters that falls under Appendix C to the ROC. The present action however, was filed by way of petition instead of the mode as prescribed by the ROC.

[5] At the outset, I drew the attention of counsel to O 5, O 88 and O 94 and Appendix C of the ROC which pertain to the modes of commencement of proceedings. I have, for ease of reference, reproduced the relevant Orders.

[6] Order 5 r 1 reads as follows:

> Except as provided in these Rule and subject to Order 94, rule 2, proceedings shall be commenced either by originating summons or by writ.

[7] Next, O 88 r 2 reads as follows:

> Except for the proceedings specified in Appendix C relating to Winding Up of companies and capital reduction under the Act, proceedings under the Act shall be commenced by originating summons.

[8] Then, O 94 reads as: A

(1) Order 5 r 1 shall not apply to the proceedings under the matters law listed in Appendix C, except as provided under these Rules.

[9] Finally, I refer to Appendix C to the ROC which is reproduced below: B

Appendix C

List of Exempted Laws

(1) item	(2) Proceedings	(3) Written LAw
1	Bankruptcy proceedings	Bankruptcy Act 1967
2	Proceedings relating to the winding up of companies and capital reduction	Companies Act 1965
3	Criminal proceedings	Criminal Procedure Code [Act 593]
4	Proceedings under the Elections Offences Act 1954	Election Offences Act 1954 [Act 5]
5	Matrimonial Proceedings	Law Reform (Marriage and Divorce) Act 1976 [Act 164]
6	Land Reference	Land Acquisition Act 1960 [Act 486]
7	Admission to the Bar	Legal Profession Act 1976 [Act 166] Advocates Ordinance of Sabah [Sabah Cap.2] Advocates Ordinance of Sarawak [Sarawak Cap. 110]
8	Proceedings under the Income Tax Act 1967	Income Tax Act 1967 [Act 53]

C D E F G

[10] The above provisions in the ROC make it abundantly clear that the present application ought to have been filed by way of originating summons and not by way of petition. Under the ROC, the only matters under the Companies Act 1965 which are to be filed by way of petition are matters falling under s 62 (capital reduction) and s 218 (winding up) (see Appendix C to the ROC). H

[11] Hence, under the ROC, proceedings under s 181 of the Companies Act 1965 are to be commenced by way of originating summons. I

[12] Order 88 r 2 of the ROC, now provides that all matters under the Companies Act 1965 (other than those falling within Appendix C) are to be filed by way of originating summons. In this case, it is obvious that the wrong mode of commencement was used.

[13] However, the respondents raised no objection to the fact that the wrong mode of commencement had been used. In any event, I was of the view that it was an important procedural point which I ought to raise on my own volition and deal with accordingly.

[14] The view that I took was that notwithstanding that the wrong mode had been used, the utilisation of the wrong mode was not fatal and was an irregularity which, in the interest of justice and with a generous application of indulgence and common sense, could be cured.

[15] The other option would have been to take a strict and inflexible approach and strike off this matter and for the litigant to re-file the matter properly. However, I decided not to take that route particularly as the matter had reached the final stage of the litigation process wherein all affidavits and written submissions had been filed leaving only for oral clarifications to be made to the court.

[16] In those circumstances, it appeared to me that it would be a wasteful exercise to strike off the matter. Also I took the view that to strike off the matter at this stage of the litigation would have been grossly unfair to the parties.

[17] Whilst it is true that ignorance of the law (both adjectival and substantive) is no excuse, I gave every possible allowance for the reality of the situation that during the initial months after the coming into force of the ROC, there is bound to be a degree of unfamiliarity with the changes that have been brought about by the ROC resulting in mistakes such as the present one.

[18] In this case, I noted that the petition was filed about five months after the ROC came into force. Of course, in some instances, non-compliance with the ROC may be incurable and therefore fatal. The present case does not fall into that category.

[19] In this regard, I was of the view that it was appropriate to invoke O 2 r 1(1) of the ROC which allows the court a sufficient measure of discretion to excuse such non-compliance and to regularise the action by deeming it as having been properly filed.

[20] As I said earlier, there are some instances of non-compliance which may be fatal and are not capable of being cured or regularised. It all depends on the type of non-compliance. Most certainly O 2 r 1(1) of the ROC cannot be utilised in an omnibus fashion to cure all sorts of non-compliance and it is not to be and cannot be regarded as an automatic safety net or panacea to cure all types of procedural non-compliance.

[21] In the upshot, in so far as the present non-compliance is concerned, I took into account the following:

(a) that the petition was filed shortly after the ROC came into force;

(b) that there would or could be some degree of unfamiliarity with the changes that have been brought about by the ROC;

(c) that there is no prejudice caused by the use of the wrong mode of originating process;

(d) the litigation had reached its final stage (ie submissions and decision) and

(e) that no objection was raised.

[22] As such, I decided that it was in the interest of justice that I should utilise my powers under O 2 r 1(1) of the ROC to excuse the petitioner (if I can call him that) for his non-compliance with the ROC with respect to the mode of commencement and treated this petition as having been properly filed pursuant to the ROC.

[23] For completeness, I may add that had an originating summons been filed and parties felt it was necessary to test the averments made in the affidavits then O 28 r 4 of the ROC may be invoked for parties to cross examine the deponents of affidavits. Alternatively, there is the avenue of O 28 r 8 for conversion of the originating summons to a writ. What is imperative is the process must be commenced by way of originating summons.

[24] In order to avoid confusion, I will continue to refer to the originating process as the petition but with the caveat that it should actually have been an originating summons.

NOMENCLATURE

[25] Also, in order to avoid confusion, I shall in this judgment refer to the parties as petitioner and second respondent. The first respondent, Wings Logistic Sdn Bhd shall be referred to as 'the company'. I will now deal with the merits of the petition. The parties have filed the following affidavits:

(a) affidavit in support of petition affirmed by Lee Ah Kong @ Lee Muk Sang (petitioner) on 21 December 2012 (encl 2);

(b) affidavit reply of Lee Toong Leon affirmed on 25 January 2013 (encl 6);

(c) affidavit of Chew Khoon Aik (second respondent) affirmed on 25 January 2013 (encl 7);

(d) affidavit in reply of Lee Ah Kong @ Lee Muk Sang (petitioner) affirmed on 8 March 2013 (encl 8) filed in reply to the affidavit of Chew Khoon Aik on 25 January 2013; and

(e) affidavit in reply of Lee Ah Kong @ Lee Muk Sang (petitioner) affirmed on 8 March 2013 (encl 9) filed in reply to the affidavit of Lee Toong Leon on 25 January 2013.

THE EVIDENCE PRESENTED

[26] In this case, there was no oral evidence through cross-examination of deponents. Parties were prepared to have the petition determined on the basis of affidavit evidence alone. In such a situation the role of the court is limited as it is no part of the court's function to direct parties as to how they should present their case.

[27] Of course, if before the commencement of the case, an application is made for oral evidence to be taken or for cross-examination of witnesses, then the court has to deal with it accordingly. But save where an application of that nature is made, it would be inappropriate for a court *sua motu* to dictate to the parties as to how the case is to be conducted as that would tantamount to the court taking over conduct of the litigation which is inimical to the adversarial nature of the Malaysian legal system.

[28] In this regard it is apposite and necessary to harken to the wise words of Lord Templeman in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 at p 436 where in the context of a winding up petition, he said relevantly:

> In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding up proceedings the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend. The court cannot give a direction about evidence unless one of the litigants desires such direction to be made. Of course a judge may indicate to a petitioner that unless he calls oral evidence or applies to cross-examine the deponents of the opposition so as to prove a disputed fact, his petition is likely to fail. The judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross-examine the petitioner's deponents for the purposes of disproving an allegation made by the petitioner, then the petitioner is likely to succeed. At the end

> of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the Petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

[29] In my view, Lord Templeman's advice on the autonomy of parties to decide how they should present their case is equally applicable to cases falling under s 181 of the Companies Act 1965.

[30] Indeed, I see no reason why, in a general sense, his advice should not extend to all types of civil proceedings, save perhaps for specific types of litigation where parties have to strictly comply with statutory rules and forms and are required by law to present their evidence in a particular way.

[31] Now, it is necessary to set out the events that transpired after the first day of hearing. This case was heard on various dates. On the second hearing date, I had raised a number of points including but not limited to the fact that this being a contest of affidavits, the court will only deal with those parts of the affidavits which appear to be uncontested or which are clearly established.

[32] In short, I had alluded to the limitations of any action being tried on affidavits. Parties were then supposed to appear on the next hearing date to address me on the points that I had raised.

[33] However, on the next hearing date, 9 September 2013, I was confronted with an application by the petitioner for leave to cross-examine the second respondent, whereas the second respondent applied for leave to adduce further evidence to explain the genesis and background to the loan that was given to a company in which the second respondent had an interest.

[34] Quite clearly this was a tactical maneuver by both sides to bolster their respective cases after the case had proceeded to the stage of written and oral submissions.

[35] If I had allowed both the applications then the whole case would not just have been re-opened but would have been converted into a full blown trial. This is because the case would not have been confined to just cross-examination of the second respondent but would have necessitated the petitioner being cross-examined as well.

[36] To my mind, all of these form part of litigation strategies and should have been thought through and put in place before the case was heard and not pursued as a knee-jerk reaction whilst the case is ongoing. In any case in the

supporting affidavits that were filed, there was hardly any credible explanation by both sides as to why I should exercise my discretion in their favor and allow both the applications that were made by the parties.

[37] In the result, both applications were dismissed. I then fixed another date for parties to address me completely and comprehensively on all the points that were raised.

[38] As such, with the dismissal of the two applications, the outcome of the petition became dependent solely on the contents of the various affidavits presented to this court and the submissions that were made in relation to the facts which emerged from the affidavits.

[39] To reiterate, as this was a contest of affidavits, I confined myself only to the undisputed facts and/or those averments which have not been credibly denied.

SECTION 181 OF THE COMPANIES ACT 1965

[40] The petition is one that is made under s 181 of the Companies Act 1965 and is reproduced below:

> 181 Remedy in cases of an oppression.
>
> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
>
> (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
>
> (b) regulate the conduct of the affairs of the company in future;
>
> (c) provide for the purchase of the shares or debentures of the company by other

members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

THE LAW ON SECTION 181 OF THE COMPANIES ACT 1965

[41] The starting point is the seminal case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227, where the Privy Council elaborated on the approach to be taken under s 181(1)(a) of the Companies Act 1965:

> What is attacked by sub-s (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section.

[42] Elaborating further the Privy Council said:

> ... for the case to be brought within s 181(1)(a) of the Companies Act, 1965 at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possessed a majority of the voting power and, in reliance upon the power, made policy or executive decisions, with which the complainant does not agree, was not enough. Those who take interest in companies limited by shares have accepted majority rule. It is only when majority rule passes over into a rule oppressive of the minority, or in disregard of their interests, that section can be invoked. As was said in a decisions upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of opposing can be made ...

[43] Next reference may be made to the case of *Pan-Pacific Construction Holdings Sdn Bhd v Ngui-Kee Corp (M) Bhd & Anor* [2010] MLJU 269; [2010] 6 CLJ 721 where the Federal Court had distilled the important principles which underpin a petition under s 181 of the Companies Act 1965. The following passages from the judgment of the Federal Court are relevant:

> [22] But in order to better appreciate the core issue it may be appropriate to first examine the principles of law on the application of s 181 in relation to a company which is not in the nature of quasi-partnership. Meanwhile, it is trite law that *in order to succeed in its petition the burden is upon a petitioner on the balance of probability to establish all the elements required to be proven under s 181.*

[23] This court in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716 briefly reviewed the genesis of judicial intervention in the internal affairs of incorporated companies. It said that '*Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies* ... Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v Harbottle* (1843) 67 ER 190; the second was *Mozley v Alston* (1847) 41 All ER 833 ... In time it was accepted that what has come to be known as the rule in *Foss v Harbottle*'.

[24] The judgment went on to say that the effect of such legislative provisions as s 210 of English Companies Act 1948 (later s 459 of the UK Companies Act 1985 and presently s 994 UK Companies Act 2006) which is similar but not in pari materia with s 181 of the Act which is wider in scope, 'was not to abrogate but to introduce limited exceptions to the rule in *Foss v Harbottle*'. Thus, it is fair to say that oppression for instance in company law is not a free-floating common law concept but a legislative creature.

[25] Therefore, in order to succeed in its petition pursuant to s 181 the petitioner has to establish and 'must eminently be determined according to the facts' of this case that the affairs of the company are being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of its interests, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.

[26] In other words s 181 permits judicial remedy on four categories of conduct, namely, oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct.

[27] It may also be noted that from the wordings of s 181 its *basic theme is 'unfairness'. However, unfairness 'does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. 'The court ... has a very wide discretion, but it does no sit under a palm tree'* (see *O'Neil v Philips* [1999] 2 All ER 961).

[28] In *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC it was explained (Hoffmann LJ (as he then was)) that in 'deciding what is fair or unfair for the purposes of s 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of

commercial fairness, the starting point in any case under s 459 will be to ask *whether the conduct of which the shareholder complains was in accordance with the articles of association* ... The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole ... But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of s 459'.

[29] Thus, in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 1 LNS 170 the term 'disregard of interests' is to be understood to mean 'unfair disregard' while 'oppression' denotes an 'unfairly prejudicial conduct' which means a conduct 'departing from standards of fair dealing and a violation of conditions of fair play'. But 'a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted'. And 'trivial or technical infringements of the articles were not intended to give rise to petitions under s 459' (see *Re Saul D Harrison & Sons Plc*. (Emphasis added.)

[44] In *Mega Education Systems Sdn Bhd & Anor v Ozone Glass Design Sdn Bhd & Ors* [2011] 6 MLJ 644 the court had stated that there are three important principles which was endorsed by the Federal Court in *Pan-Pacific* namely:

(a) the basic theme of an 'oppression' remedy is 'unfairness', which is to be assessed judicially and on rational principles;

(b) similar principles apply in a 'unfair prejudice' remedy and a winding up remedy on a just and equitable basis; and

(c) there is no stark right of unilateral withdrawal, where there is a mere breakdown in the relationships of trust and confidence between the shareholders.

[45] As this is a petition under s 181 of the Companies Act 1965, it would be appropriate and necessary for me to clarify that this is not a winding up petition as would be the case if it were filed under s 218 of the Companies Act 1965. If a case is made out in respect of a petition filed under s 218 of the Companies Act 1965, then the court has no choice in the matter and has to order that the company be wound up.

[46] However, that is not the case in respect of a petition filed under s 181 of the Companies Act 1965. No doubt winding up is one remedies available under s 181 of the Companies Act 1965 but it is not the only remedy. The court acting under s 181 of the Companies Act 1965 has a wide discretion in terms

of the appropriate remedy that is to be granted in order to bring an end to the oppression or conduct which is found to be unfairly prejudicial.

[47] In terms of the most extreme remedy of winding up, the general approach to granting such a relief is set out in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227:

> Winding-up is specifically mentioned in s 181(2)(e) of the Companies Act as a head of relief which the court may grant. No limiting conditions are imposed, so that the granting of it is in the discretion of the court. In exercising this discretion, the court will have in mind the drastic character of this remedy, if sought to be applied to a company which is a going concern; it will take into account (a statement which is not exhaustive) the gravity of the case made out under s 181(1); the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; the interests of other members of the company not involved in the proceedings.

[48] As for the rights of a minority shareholder, it is useful to refer to the case of *Balakrishanan Vairavapillai v Pantai Holdings Bhd & Anor* [2005] 5 CLJ 83 where the court held:

> (1) As a minority shareholder, the petitioner did not have any legitimate expectation to dictate the management decisions of the board of directors, and so long as the decisions were not taken unreasonably or without any foundation, the fact that they may have been wrong did not entitle shareholders to apply under s 181 of the Companies Act 1965 ('the CA'). The petitioner had only made unfounded inferences and conclusions that the vendors of the acquiree companies were nominees for persons unknown and that the majority shareholders were related parties to the transactions. Even if the petitioner's allegations were true, it was settled law that any shareholder was entitled in a general meeting to vote in any way they deemed fit, and owed no duty to anybody as how such a vote was to be exercised. (pp 98 b-c and 99 g-h)

[49] Then, as for the minority shareholder being outvoted, it is appropriate to refer to the decision of the Court of Appeal in *Hoy Pak Kwai (suing on behalf of himself and for Company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors* [2007] 1 MLJ 508; [2007] 1 CLJ 121 where it was stated among others, that the mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which other members of the board or shareholders oppose would not in general constitute oppression. For a petition to succeed, it must be shown that there has been oppression in a real sense of members qua shareholders, and not merely a subordination of their wishes to the power of the voting majority.

[50] In *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242 oppressive

conduct was explained as follows:

> In order to establish that a person conducting the affairs of a company against was doing so oppressively within s 210 of the Companies Act, 1948, it must be shown at least that he was *acting unfairly towards the person claiming to be oppressed*; and, since the allegations in the present, case did not suggest that E acted unfairly, harshly, or with any lack of probity towards any member of the company, *although the allegations suggested that he was unwise, inefficient and careless in the performance of his duties as managing director, the conduct alleged did not amount to oppressive conduct* within s 210, with the consequence that such conduct was also not established against G, Ltd Or H, Ltd (see p 247 Letters A, G and I, post).

At p 246, Buckley J stated:

> To succeed in obtaining relief under s 210 of the Companies Act, 1948, *a member of a company must have established that at the time when his Petition was presented the affairs of the company were being conducted in a manner oppressive of himself*, or of a part of the members including himself, and unless a Petitioner in his Petition alleges facts capable of establishing that the company's affairs are being conducted in such a manner, the Petition will disclose no ground for granting any relief and will be dismissed in limine as being demurrable. First *the matters complained of must affect the person or persons alleged to have been oppressed in his or their character as a member or members of the company*. Harsh or unfair treatment of the Petitioner in some other capacity, as for instance a director or a creditor of the company, or as a person doing business or having dealings with the company, or in relation to his personal affairs apart from the company, cannot entitle him to any relief under s 210.
>
> Secondly, *the matters complained of must relate to the conduct of the affairs of the company*. Thirdly, *they must be such as not only to make the winding-up of the company just and equitable, but also to lead to the conclusion that the affairs of the company are being conducted in a manner which can properly be described as 'oppressive' of the Petitioner*, and, it may be, other members. The *mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether* on grounds relating to policy or to efficiency, however well founded. *Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed*. In *Scottish Co-operative Wholesale Society, Ltd v Meyer* (1) (a case under s 210) Viscount Simonds adopted a dictionary definition of the *meaning of 'oppressive'* by, it is said, *'burdensome, harsh and wrongful'*.
>
> In *Elder v Elder & Watson, Ltd*, also a case under s 210, the Lord President (Lord Cooper) said (2):
>
> > ... the essence of the matter seems to be that *the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to reply.* (Emphasis added.)

[51] In discussing the definition of the word 'oppressive', Buckley LJ had this to say in the judgment under *In Re Jermyn Street Turkish Baths Ltd* [1971] 1

WLR 1042:

> In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and *when such conduct is unfair* or, to use the expression adopted by Viscount Simonds in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324342 *'burdensome, harsh and wrongful' to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs*: see *Scottish Co-operative Wholesale Society, Ltd v Meyer* and *In re H R Harmer Ltd* [1959] 1 WLR 62.
>
> (Emphasis added.)

THE PETITIONER'S COMPLAINT

[52] The gist of the petitioner's complaint is that the second respondent is in control of the company and that his management of the company is highly questionable and that he had abused his powers. The heads of the petitioner's complaints are as follows:

(a) that since 2002, the petitioner had not been consistently receiving notices of the company's Annual General Meeting ('AGM') or its audited reports;

(b) the company has not been paying annual dividends to its shareholders;

(c) the second respondent caused the company to lend a sum of RM120,480 to a company in which the second respondent has controlling interest;

(d) the petitioner claimed that under the stewardship of the second respondent, the company is incurring huge operating costs and administrative expenses amounting to hundreds of thousands of Ringgit every year; and

(e) the second respondent has abused his powers as a director which is unfairly prejudicial and oppressive and lacks probity justifying a loss of trust and confidence in his management.

[53] I have taken the liberty of extracting the following facts from the petitioner's submissions which form part of the petitioner's narrative.

[54] The company was incorporated on 3 September 1994 under the Companies Act 1965 as a private company limited by shares. The registered office of the company is situated at 51-13-A, Menara BHL Bank, Jalan Sultan Ahmad Shah, Georgetown, Penang. The objects for which the company was established are set forth in cl 3 of its memorandum and articles of association

which includes as follows:

> To *collect rent*, rates, interest, premiums and *any monies due by tenants, sub-tenants* etc, and to organize the monies so collected for the furtherance of the Company's objectives or to deposit, invest the same, or advance the same to any person or persons or corporations either with interest or without, upon the security of property, by way of mortgage or marketing security for the purpose of enabling the person borrowing the same to erect or purchase or enlarge or repair his holdings, lots, sections or partitions. (Article 3(7))
>
> *To purchase for investment and sell freehold or other house property, buildings, or lands or any share or shares, interest or interests therein* (Article 3(25)) (Emphasis added.)

[55] The authorised capital of the company is RM5,000,000 only divided into 5,000,000 ordinary shares of RM1 each. The issued and paid-up capital of the company is RM2,000,000.

[56] At the material time, the members or shareholders of the company are as follows:

Shareholder	Number of shares	Percentage
Lee Muk Sang @ Lee Ah Kong	140,000	7%
Chew Khoon Aik	930,000	46.5%
Lee Toong Leon	930,000	46.5%

[57] Chew Khoon Aik and Lee Toong Leon have since transferred all of their shares (save for one share) to an entity known as 555 Capital Sdn Bhd. The company's board of directors consists of the second respondent and Lee Toong Leon only.

THE COMPANY'S PRINCIPAL BUSINESS

[58] At the material time, the company's principal business is property holding and its only asset was the property bearing the assessment address of 80-B, Jalan Bayan Lepas, Phase IV, Bayan Lepas, Penang ('the said property').

[59] The company's sole source of income is the rental received from the letting of its bonded warehouse situated at the said property. This has been admitted by the second respondent in para 8 of the affidavit of the second respondent affirmed on 25 January 2013. The company has recently purchased more properties but apparently does not derive an income from the said properties.

THE SECOND RESPONDENT HAVING EFFECTIVE CONTROL OVER COMPANY

[60] The second respondent was at all material times and still is in control of the company. The second respondent's control of the company is predicated on the following:

(a) the second respondent as one of the directors of the company has been in charge of the administration and financial aspects of the operation of the company since the petitioner became a shareholder in the year 2002;

(b) the second respondent is the cheque signatory to the company's accounts; and

(c) the second respondent has full knowledge and control of the affairs of the company.

[61] It was pointed out that paras 13(i), (ii) and (iii) of the petitioner's affidavit affirmed on 21 December 2012 (encl 2) where he alluded to the matters stated above pertaining to or evidencing the second respondent's control of the company have in fact been admitted by the second respondent by way of para 9 of the affidavit of the second respondent affirmed on 25 January 2013.

DEALINGS BY THE SECOND RESPONDENT WITH THE COMPANY'S MONIES

[62] The audited reports of the company reveal that the company's operating costs and administrative expenses run into hundreds of thousands of Ringgit every year:

Year	Direct operating costs (RM)	Administrative expenses (RM)
2002	641,362	825,718
2003	481,720	739,474
2004	360,349	270,651
2005	200,446	413,047
2006	258,948	242,886
2007	273,740	472,961
2008	195,546	446,814
2009	169,326	619,112
2010	237,340	605,525
2011	168,011	1,262,482

[63] Copies of the reports and financial statements for the company in the years 2002–2011 are annexed to the petitioner's affidavit affirmed on 21 December 2012 and marked respectively as follows:

- Reports and financial statements for the year ended 31 December 2002 is marked as exh 'LMS-3A'.

- Reports and financial statements for the year ended 31 December 2003 is marked as exh 'LMS-3B'.

- Reports and financial statements for the year ended 31 December 2004 is marked as exh 'LMS-3C'.

- Reports and financial statements for the year ended 31 December 2005 is marked as exh 'LMS-3D'.

- Reports and financial statements for the year ended 31 December 2006 is marked as exh 'LMS-3E'.

- Reports and financial statements for the year ended 31 December 2007 is marked as exh 'LMS-3F'.

- Reports and financial statements for the year ended 31 December 2008 is marked as exh 'LMS-3G'.

- Reports and financial statements for the year ended 31 December 2009 is marked as exh 'LMS-3H'.

- Reports and financial statements for the year ended 31 December 2010 is marked as exh 'LMS-3I'.

- Reports and financial statements for the year ended 31 December 2011 is marked as exh 'LMS-3J'.

[64] In the petition, the petitioner has expressed grave concerns regarding the quantum of the abovementioned costs and expenses as the company's revenue is generated solely from the rental of its one asset, the bonded warehouse, and the company's auditors have confirmed that there is only one member of staff employed by the company; see note 11 at p 21 of the company's audited report for the year ending 31 December 2009.

[65] In the years 2008 and 2009, staff costs were reported to be in the total sum of RM242,500 each year and the administrative costs were reported to be RM446,814 and RM619,112 respectively. In the year 2011, the administrative costs rose (according to the petitioner) inexplicably to RM1,262,482 when the principal activity of the company remained the same ie collection of rental from one property.

[66] The petitioner says that second respondent's management of the company is highly questionable considering that at all material times, all that was required was a clerical staff to collect rental and issue receipts to the tenant of the said property and even then, to do so only once a month.

[67] Next the petitioner says that the second respondent's assertion that the sole employee is a general manager ('the GM') (para 13 of the affidavit of Chew Khoon Aik affirmed on 25 January 2013 – encl 7) is highly questionable. The petitioner asks rhetorically: why does the company require a GM when there is no staff to manage as there is no business to run and as the only activity within the company is collection of rental? According to the petitioner, the second respondent has failed to account for the company's exorbitant expenses when there is no business activity or operations conducted by the company.

ABUSE OF POWERS BY SECOND RESPONDENT

[68] It is alleged by the petitioner that since 2002, the petitioner has not been consistently receiving notices of the AGM or its audited reports for each financial year. The petitioner had attended the AGM of the company on 26 June 2002, 31 December 2003 and 30 June 2004 only because Miss Anne Ong, the company's clerk had telephoned to inform him of the said meetings.

[69] The petitioner had not received notices of meetings by telephone or post until his solicitors had via their letter dated 25 June 2012 written to the company secretary to give notice that he had not been receiving any notices of AGM and annual reports. A copy of the letter dated 25 June 2012 from Choy & Assoc is annexed to the petitioner's affidavit affirmed on 8 March 2013 as exhibit marked 'LMS2' (encl 9).

[70] In reply, the company secretary in his letter dated 2 July 2012 did not deny that the petitioner had not been sent notices and had merely asked him to go to his office to collect the relevant documents. A copy of the letter dated 2 July 2012 from the company secretary under the letterhead of Fastrack Corporate Sdn Bhd is annexed to the affidavit of Lee Ah Kong @ Lee Muk Sang affirmed on 8 March 2013 as exhibit marked 'LMS3' (encl 9).

[71] The company has not been paying annual dividends to its shareholders although its rental income is high. The company's revenue per year is well over RM1m as can be seen from the figures extracted herein-below from the company's audited accounts:

Year	Revenue (RM)	Gross Profit (RM)
2002	2,140,000	1,498,638
2003	1,854,000	1,372,280

2004	1,728,000	1,367,651
2005	1,618,000	1,417,554
2006	1,414,000	1,155,052
2007	1,344,000	1,070,260
2008	1,344,000	1,148,454
2009	1,245,440	1,076,114
2010	1,236,480	999,140
2011	1,418,609	1,250,598

[72] The second respondent has also caused the company to lend a substantial sum of RM120,480 to a company in which he has controlling interest (see note (4) at p 19 of the company's audited report for the year ending 31 December 2010). According to the second respondent, this is in blatant breach of s 133A of the Companies Act 1965 which prohibits loans to a person connected with a director. Section 122A(1)(b) of the Companies Act 1965 defines persons connected with a director as 'a body corporate which is associated with that director'.

[73] The second respondent has confirmed the debt (para 16 of the affidavit of Chew Khoon Aik affirmed on 25 January 2013) and that it has been repaid. However, the second respondent has failed to explain why the loan was made in the first place and why he did not seek the shareholders' approval at a general meeting when there was a conflict of interests as the loan was made to a company which he controlled. The petitioner has no knowledge of the particulars of the entity which borrowed the sum of RM120,480 from the company.

[74] In any case, the repayment does not exonerate the second respondent's breach of s 133A of the Companies Act 1965 and is in fact, evidence of the second respondent's oppressive conduct in that he had utilised the company's money for his own company's benefit to the detriment of the company and the petitioner. Accordingly, there is no transparency or accountability in the second respondent's dealings with the company's assets and monies.

COMPANY IS HEALTHY AND PROFITABLE

[75] The company's business of renting out the said property as a bonded warehouse ought to be highly profitable as there should only be negligible operating costs. Yet the company under the stewardship of the second respondent is incurring operating costs and administrative expenses amounting to hundreds of thousands of Ringgit every year and in 2011, the figure rose to RM1,262,482. The second respondent together with Lee Toong Leon received a total of RM100,000 and RM60,000 as directors' fees for the

financial years ending 31 December 2011 and 31 December 2010 respectively although there is no business to run as the company's sole source of income is collection of rental from the bonded warehouse only.

[76] In the result, the petitioner maintains that the second respondent has abused his powers as a director and a substantial shareholder in a manner which is unfairly prejudicial and oppressive, and lacks probity justifying a loss of trust and confidence in his management.

[77] The second respondent admits that he, as one of the directors of the company, has been in charge of the administration and financial aspects of the operation of the company since the petitioner became a shareholder in the year 2002 (see para 9 of the affidavit of Chew Khoon Aik affirmed on 25 January 2013) (encl 9).

[78] The petitioner maintains that the second respondent pays himself a generous director's fee and employs a single employee at the cost of hundreds of thousands of Ringgit merely to collect rental from a single tenant for the bonded warehouse.

[79] In the circumstances, the petitioner's maintains that the second respondent's said conduct which is in self-interest, unfair and unjust, can easily be seen as oppressive as he has abused his dominant position to the detriment of the company.

[80] Counsel for the petitioner referred to s 132(1) of the Companies Act 1965 which provides as follows:

> A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

[81] The petitioner says that the second respondent's conduct in the discharge of his duties and in managing the affairs of the company cannot be described as honest or reasonably diligent when he has failed to-date to give an account of the company's extravagant administrative expenses.

[82] Counsel for the petitioner relied heavily on the decision of the Singapore High Court in *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 3 MLJ 137. In that case the company was making profits but no dividends were recommended to be paid to shareholders for the years 1984–1988. Between the years 1984–1988, the respondents drew salaries and bonuses and had also obtained directors' remuneration. Chao Hick Tin J held as follows on the issue of non-payment of dividends:

> Does the fact that no dividends had been declared by the company in respect of consecutive years 1984 to 1988 constitute 'oppression' or 'disregard'. In appropriate circumstances I am of the view that non-payment of dividends could amount to 'oppression' or 'disregard'. In the circumstances of the present case I would say yes.

[83] Chao Hick Tin J went on to hold that there was oppression:

> In my view it was grossly inequitable that the majority shareholders should make use of their controlling power in both the general meeting and the board to adopt a policy which only benefitted themselves and gave hardly any benefit to the minority shareholders ... I could not see any justification for depriving the petitioners (including the shares of Madam Tan Poh Tee), who held more than 40% of the shares of the company, a fair return for their shareholdings. On the other hand, what I saw was that of the five respondents, four were holding executive positions in the company and were drawing salaries and bonuses. In addition, each and every one of them obtained directors' fees.

[84] It was submitted for the petitioner that the complaints presented in the petition herein are on all fours with the facts in *Re Gee Hoe Chan Trading Co Pte Ltd*. In this petition, the company apparently makes profits in excess of RM1m almost every year and yet the petitioner does not receive any benefit out of that. According to the petitioner, the deprivation of benefits and dividends to the petitioner while the second respondent helps himself to directors' fees and lends money to his own company, is clearly oppression.

THE SECOND RESPONDENT OUGHT TO PURCHASE THE PETITIONER'S SHARES

[85] The second respondent claims that 'the petitioner's investment in the company would have increased many folds' (see para 19 of the affidavit of Chew Khoon Aik affirmed on 25 January 2013 – encl 7). In response to this the petitioner says that the increase in value of the petitioner's investment is meaningless having regard to the following:

(vi) the petitioner has been kept out of the management of the company;

(vii) the petitioner has no control over the affairs and expenses of the company which is in the control of the second respondent; and

(viii) the petitioner has not received any dividend or a single benefit from his investment in the company, a fact which is not in dispute.

[86] The petitioner says that it is not surprising at all that the second respondent is not prepared to purchase the petitioner's shares in the company considering that the second respondent has complete control over the company and is abusing his powers as a substantial shareholder and director.

[87] The petitioner also complains that the second respondent has not been frank and had failed to disclose to the court that he had via an agreement dated 6 April 2011 offered to purchase all the petitioner's shares in the company for RM420,000 at RM3 per share when he already knew that the net tangible asset value is RM9.74 per share. A copy of the said agreement dated 6 April 2011 is annexed to the affidavit of Lee Ah Kong @ Lee Muk Sang affirmed on 8 March 2013 as exhibit marked 'LMS4' – encl 9.

[88] It is alleged that when the petitioner refused to sell his shares cheaply, the second respondent proceeded to transfer his shares to 555 Capital Sdn Bhd without the petitioner's knowledge in an attempt to thwart any effort by the petitioner to take action against him. However, it is undisputed that the second respondent is still owner of the same percentage of shares through his indirect interests via 555 Capital Sdn Bhd and is still the managing director of the company, controlling the company's affairs.

[89] It was submitted that s 6, 6A(4)(c) and 6A(5) of the Companies Act 1965 effectively strips the corporate veil off 555 Capital Sdn Bhd to reveal exactly the same interests held by the second respondent in the company. The second respondent together with Lee Toong Leon are the only shareholders and directors of 555 Capital Sdn Bhd and are accordingly, deemed to be the indirect owners of the 92.9999% shares held by 555 Capital Sdn Bhd in the company.

[90] The petitioner referred to s 181(1)(a) of the Companies Act 1965 and maintained that he is entitled to file the action herein based on the second respondent's conduct qua director and not shareholder. As such, the second respondent's shareholding is irrelevant especially having regard to his admission that he is in charge of the affairs of the company at all material times (para 9 of the affidavit of Chew Khoon Aik affirmed on 25 January 2013 – encl 7).

[91] The petitioner's stand is that the repayment of the loan by the second respondent's company does not assist him as it is still evidence of the oppressive conduct by the second respondent.

REMEDIES AVAILABLE TO THE PETITIONER

[92] There seems to be no dispute that the current value of the company's shares is RM9.74 per share. As such, the petitioner says that it is most equitable and just for the second respondent to purchase all of the petitioner's shares at the said price.

[93] It was submitted that in the event the court finds it unsuitable for the second respondent to purchase the petitioner's shares in the company, then it would highly appropriate for the company to be wound up.

[94] The petitioner maintains that there is no ongoing business or goodwill to be preserved as the company owns properties only from which rental is derived from one property. The properties can be easily disposed off upon winding up. In any case, the second respondent has adduced no evidence of what prejudice would be suffered by him or the company in the event of a winding up order.

[95] In the circumstances, the petitioner took the position that it is highly appropriate for the company to be wound up and for the official liquidator to liquidate the company.

THE RESPONDENTS' ANSWER TO THE ALLEGATION OF OPPRESSIVE CONDUCT

[96] The second respondent maintained that he as well as the other director, Mr Leong Toong Leon, own only one share each which is equivalent to 0.00005% of the shareholdings as reflected in company's latest annual returns up to 12 July 2012. The majority shareholder of the company is 555 Capital Sdn Bhd which is a separate entity from the second respondent.

[97] The petitioner had never made any attempt whatsoever to call for any general meeting and as such, the petitioner's allegations that it will be futile to call for an extraordinary general meeting was presumptuous.

[98] The petitioner's allegation that the company should not have incurred huge operating costs and administrative expenses has been explained by the second respondent in para 11 of second respondent's affidavit in reply affirmed on 25 January 2013 (encl 7).

[99] The petitioner had sent his proxy (Mr Wong Thai Sun) (p 20 of affidavit of Lee Toong Leon exh LTL3 – encl 6) who had sought clarifications on the items stated therein. The details and breakdown of the expenditure can be found at pp 21–22 of LTL2 of encl 6.

[100] The second respondent has explained that the direct operating costs and administrative expenses have been duly audited by the independent external auditor namely Grant Thornton which can be seen in the reports and financial statements exhibited as LMS3A, LMS3B, LMS3C, LMS3D, 3E, 3F, 3G, 3H, 3I, and 3J respectively in the petitioner's affidavit in support.

[101] The allegation by the petitioner that the administrative costs for the year 2011 had 'inexplicably' risen to RM1,262,482 was misleading. It was not appropriate for the petitioner to assume that the company needs only one clerical staff to manage the bonded warehouse since the petitioner is not involved in the day to day management of the company and is not familiar with the operation of the company.

[102] As regards the allegation by the petitioner that he has not been consistently receiving notices of the company's AGM or its audited reports for each financial year, the respondents had explained in para 14 of the affidavit in reply that notices were sent by the company secretary to all shareholders, including to the petitioner. If indeed the petitioner had not received the notices, it was not the fault of the company or the second respondent. In fact, the petitioner had attended the company's AGM's in 2004, 2003 and 2002 (see: exhs LTL4A, LTL4B and LTL4C affidavit of Lee Toong Leon – encl 6). As regards payments of dividends, the respondent has explained that the company did not pay dividends to the shareholders as the company had used the retained earnings to expand the business of the company including purchasing the 13 units of the shop lots at Maritime Piazza.

[103] The petitioner did not get any dividends and it is also true for the other shareholders. The dividends if ever were declared would have entitled the other shareholders to an even bigger quantum of dividend proportionate to the share-holdings.

[104] Therefore, there was no abuse of power by the directors of the company towards the shareholders since the decision to expand the business of the company would benefit all the shareholders in the long run. Also all costs and expenses were audited by an independent auditor and there were no reports of any discrepancy whatsoever.

[105] The second respondent had conducted the affairs of the company in a fair manner and ventured into an investment via acquisition of the 13 units of shop lots in Maritime Piazza with a view to expanding the business of the company.

[106] The decision to acquire the properties was made in the extraordinary general meeting on 18 May 2012 which the petitioner did not attend despite notice having been sent by the secretary of the company on 3 May 2012 (see p 18, exh CKA2, affidavit of Chew Khoon Aik – encl 7).

[107] As regards the allegation of the petitioner that the second respondent had caused the company to lend RM120,480 to another company, the second respondent had explained that the money has been fully repaid as reflected in

exh LMS3J annexed to the affidavit of the petitioner (encl 2), p 19 (note 4) of reports and financial statement 31 December 2011.

[108] In answer to the petitioner's attempt at impugning the loan as being contrary to s 133A of the Companies Act 1965, it was submitted that that is a non-starter as the company was an exempt company at the material time when the loan was given and that it was only when the loan was repaid that the company had become a non-exempt company.

[109] Based on the facts stated above, it was claimed that the second respondent had not abused his powers as a director and a substantial shareholder of the company. There was no evidence that the second respondent has acted in any manner which is unfairly prejudicial and oppressive to the said petitioner as a shareholder.

[110] Furthermore, the petitioner had acquired 140,000 shares in the company in 2002 and 2003 at the consideration of RM1 per share and the company's total assets had increased to RM25,208,773 compared to RM7,353,533 as at 31 December 2003.

[111] Based on the net tangible asset of the company as at 31 December 2011, the company's share would now be worth about RM9.74 per share which means the petitioner's investment had increased many folds.

[112] Based on the reports and financial statements exhibited in the second respondent affidavits, there is no ambiguity or surreptitious conduct on the part of the second respondent or the company for that matter or the non-disclosure of financial data and as such, there was no basis for the petitioner's claim of oppressive conduct or abuse of powers.

WHETHER THE COURT CAN COMPEL THE SECOND RESPONDENT TO BUY THE PETITIONER'S 7% SHARE IN THE COMPANY

[113] The petitioner had in his petition prayed for an order that the second respondent buy his entire shareholding in the company. It is the second respondent's position that that the petitioner had presented this petition under s 181 of the Companies Act 1965 to exert pressure on the second respondent to buy his (the petitioner's) share.

[114] According to the second respondent this petition was presented to put pressure on the second respondent in order to achieve a collateral purpose wherein the real object of the petition was not to complain of oppression but to get the second respondent to buy the petitioner's share.

[115] Counsel's submission on collateral purpose was predicated on the decision Plowman J in *Re Bellador Silk Ltd* [1995] 1 All ER 667, where he found that the petitioner was not entitled to relief under s 210 (which is equivalent to s 181 of the Malaysian Companies Act 1965) because the presentation of the petition was to bring pressure to achieve a collateral purpose and that was an abuse of the process of the court.

[116] Furthermore, it was submitted that the company was profitable and there was no reason why the court should order it to be wound up or force one shareholder to buy out the other just because one did not like the other.

[117] In addition, as a minority shareholder, the petitioner did not have any legitimate expectation that his views will prevail over the management decisions of the board of directors and so long as the decisions were not taken unreasonably or without any foundation, the fact that they may have been wrong did not entitle shareholders to apply under s 181 of the Companies Act 1965.

THE DIRECTORS REMUNERATION

[118] The petitioner had questioned the director's fees received by second respondent and Lee Toong Leon for the sum of RM100,000 and RM60,000 respectively each year.

[119] It was submitted for the second respondent that the directors fees were voted and approved by the shareholders and the payment was made pursuant to their entitlement. Thus, there is no oppression or unfairness to the shareholders.

THE COURTS FINDINGS AND CONCLUSIONS

[120] The complaint of the petitioner stems from the fact that the second respondent is in control of the company and that his management of the company is highly questionable and that he had abused his powers. The heads of the petitioner's complaints can be summarised as follows:

(a) since 2002, petitioner had not been consistently receiving notices of the company's AGM's or audited reports;

(b) the company had not been paying annual dividends to its shareholders;

(c) the second respondent caused the company to grant a loan RM120,480 to a company in which he had a controlling interest;

(d) under the stewardship of the second respondent, the company is incurring huge operating costs and administrative expenses; and

(e) the second respondent has abused his powers as a director which is unfairly prejudicial and oppressive and lacks probity justifying, loss of trust and confidence in his management.

NOTICE OF AGM/AUDITED REPORTS

[121] At the outset, it is my finding that the second respondent was/is most definitely in control of the company. Next, in so far as the notices of AGM are concerned, of course it is true that under article 41 of the Article of Association, all that the company has to do is to send the notices by post and that is the end of that. There is no evidence that there has been any deliberate attempt on the part of the second respondent or the company secretary, not to issue notices of AGM to the petitioner. It is to be noted that the petitioner attended the AGMs for 2002, 2003, 2004.

[122] Since 2005, he has not been attending AGMs. For the AGMs that he attended, he was notified by the staff of the company and therefore he was able to attend the AGMs. Since 2005 until 2012, there seems to have been inertia on the part of the petitioner or as was submitted by counsel for the respondents, the petitioner went into slumber.

[123] Clearly there seems to be no action on the part of the petitioner, with respect to the notices of AGM and also in respect of the audited reports for the previous years when he did not attend the AGM. Now, all along petitioner says he has not been attending AGMs but at the same time, the petitioner could not have been unaware that there will be AGMs for the company every year, and therefore he could have himself made inquiries with the company secretary or with the directors or with the staff of the company which does not seem to have been done.

[124] In so far audited reports are concerned these are a matter of public record and the petitioner could have obtained these reports from the Companies Commission of Malaysia for the years that he did not attend the AGMs and therefore such a complaint that he did not receive audited reports cannot to my mind amount to oppressive conduct on the part of the second respondent.

[125] In so far as the complaint that he has not been receiving annual dividends is concerned, that has always been the case since 2002 when he became a shareholder until he filed the petition on 7 January 2013. And so for almost ten years, he has not been receiving dividends. The question is: what has he been doing all these years? He appears to have gone along without receiving any dividends and it is rather late for him to complain in 2012 that he has not received dividends and that that is a manifestation of oppressive conduct.

[126] There has obviously been delay and the principle enunciated in *Re Sensun Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 applies, regardless of the fact that the petitioner was not in management of the company. The principle is that the complainant should not delay in making complaints of so called oppressive conduct otherwise he would be deemed to have acquiesced to the conduct and may be precluded from mounting a challenge by way of an action under s 181 of the Companies Act 1965.

[127] Now, on the topic of annual dividends also it must be borne in mind that it is the discretion of the directors whether to declare dividends or not. As was rightly pointed out, in the initial years, the company was indebted to directors and financiers. So, payment of dividends was, properly in the exercise of the discretion of the management, not declared.

[128] Then when we also look at the articles of association it provides for the company to invest in property and this is exactly what they have done. They have a bonded warehouse which is yielding income by way of rentals and they have also ploughed the access funds of the profits available for distribution, into the purchase of the 13 shop-lot units in Maritime Piazza.

[129] When looked at objectively, it would appear that that is good investment and because of all these investments, the share value of the petitioner's share has appreciated. Again, that repudiates any notion of oppressive conduct against the second respondent based on non declaration of dividend.

[130] In this regard, although it is tempting to conclude that the case of *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 3 MLJ 137; [1991] SLR 837, is on all fours with the present case before me, it is I think quite clearly distinguishable as the learned judge in that case had very pointedly made a finding of fact that the non-payment of dividend in that case was a way of punishing the petitioners. The following observation of the judge in the grounds of judgment makes this point rather clear. He said, at p 141:

> Looking at the evidence objectively, I did not think I could accept the explanations of the respondents. The truth was probably, and I do so find, that the respondents were upset that the petitioners had the audacity to question how the respondents managed the company and to even think to withdraw from the company. I am inclined to believe that, the non-declaration of dividends was the respondents' (who controlled both the general meeting and the board of directors) was to punish the petitioners.

[131] In the present case there is no assertion by the petitioner that the non-declaration of dividends was targeted specifically at the petitioner.

[132] Lastly, I observed that the petitioner's proxy Mr Wong Thai Sun who attended the AGM on 12 July 2012 asked several questions about expenses but raised no specific question about non-payment of dividend (see exh CKA3 encl 7). So it was clear that the petitioner was only concerned with the surge in expenses but was not concerned with non-payment of dividends.

[133] Of course, when this petition was filed, non-payment of dividends took centre stage.

[134] To conclude on this point, I think it would be relevant for me to quote a passage from the judgment of Hamid Sultan JC, (as he then was) in *See Hua Realty Bhd v See Hua News Holdings Sdn Bhd & Ors* [2007] 7 MLJ 525 which reads as:

> Unwise, inefficient or careless conduct of director or directors in my view will not pass this test. The learned authors of Datta on *The Company Law* (4th Ed) at p 809 set out the acts the court held as oppressive and those which were not held as oppressive. It reads as follows:
>
> It must go beyond what is required to make out a case for a winding up order and must indicate some lack of probity or fair dealing towards one or more members of the company (*Fildes Bros Ltd* [1970] 1 All ER 923). This section covers oppression by anyone who is taking part in the conduct of the affairs of the company whether de facto or de jure (*HR Harmer Ltd, Re* [1959] 1 WLR 62; [1958] 3 All ER 689). It is not essential that the alleged oppressor is oppressing in order to obtain a financial benefit; conduct may be oppressive even if it is simply due to overwhelming desire for power and control (*KRS Narayana Iyengar v T A Mani, A* 1960 Mad 338; HR Harmer). An act of omission might amount to oppressive conduct if it is shown that it was designed to achieve some unfair advantage (*Five Minutes Car Wash Services Ltd* [1966] 1 WLR 745). Where after the life insurance business of a company was nationalised the majority wanted to use the assets in some other business, it was held that this amounted to oppression on the minority (*Hindusthan Co-operative Insurance Society Ltd* 65 CWN 68). It is an oppression to pass a resolution prejudicing the interest of the company or its shareholders generally (*AM Varkey v JR Motishaw A* 1964 Ker 114).
>
> Unreasonable conduct of directors of a private company in refusing, owing to private disputes, to register transfer of some shares while transferring some other shares bequeathed under a will, involves the violation of the conditions fairplay and amounts to oppression (*Mrs Gajarabai v Patny Transport P Ltd* (1965) 2 Comp LJ 234). Overthrow of the majority by physical force though a single act, its effect is likely to persist indefinitely and amounts to oppression of the majority by a minority and an order should be made under this section (*Ramashankar Prasad v Sindri Iron Foundry Pvt Ltd, A* 1966 Cal 512).
>
> Acts held not oppressive – Allegations of unwise, inefficient and careless conduct against a director in the performance of his duties cannot in themselves give rise to any claim for relief under this section and a petition limited to such allegations will be dismissed in limine. Acts of misappropriation and mismanagement or improper payment of dividend in the past cannot support an application under this section:

they must be continuing up to the time of presentation of application (*Stadmed Private Ltd v Kshetra Mohan Saha,* 72 CWN 601, 616). Denial of right of inspection or other right of a shareholder *or failure to comply with formalities required in the matter of giving notice of general meeting or refusal to declare more than moderate rate of dividend even though the profits earned could justify a higher rate of dividend may not, taken by themselves, amount to oppression* (*Maharani Lalita Rajya Lakshmi v Indian Motor Co, A* 1962 Cal 127). Mere illegal or irregular acts, unless they are oppressive or prejudicial to the interests of the company or to public interest, cannot support a petition (*Seth Mohanlal Ganpatram v Shri Sayaji Jubilee Cotton and Jute Mills Co Ltd, 34 Comp Cas 777*) (see p 536) (Emphasis added.)

It has been held that the court has no jurisdiction to interfere with the internal management of companies so long as they are otherwise being managed in accordance with the law (see *Re Tri-Circle Investment Pte Ltd*. Further, the court will not concern itself with the rationality of a business decision taken by the directors unless there is fraud, (see *Dato' Toh Kian Chuan v Swee Construction and Transport Co (Malaya) Sdn Bhd* [1996] 1 MLJ 730). It is also an established principle that the relief under s 181 is only available to an applicant who has suffered harm in his capacity as a member of the company (see *Re A Company* [1983] 2 All ER 36) and it would be denied to him where he has acquiesced to the conduct complained of (see *Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326). In *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227, the Privy Council explained that for s 181 CA 1965 to be applicable, the petitioner must prove 'oppression' or disregard, that is to say: (i) there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play; or (ii) an awareness of the interest and a conscious decision to override it or brush aside that interest. *In Re HW Thomas Ltd* (1984) 2 ACLC 610, the New Zealand Court of Appeal held that the terms 'oppressive', 'unfairly discriminatory or unfairly prejudicial' were not to be regarded as three distinct alternatives which are to be considered separately in watertight compartments. They were to be read together. The court further held that question of the fairness or otherwise of the company's financial management had to be examined against the background of the company and reasonable expectations of its members and not simply from the applicant's point of view. This involved the balancing of the conflicting interests of the different groups within the company to see if there was a 'visible departure from the standards of fair dealing'. (see p 540)

[135] Based on the above, it seems that failure to send notices of meetings or non declaration of dividends are not of themselves conduct which may be regarded as oppressive.

LOAN OF RM120,480

[136] In so far as the loan of RM120,480 is concerned, it ultimately came to nothing because at the time when the loan was given the company was an exempt company. Therefore there was no breach of s 133(A) of the Companies Act 1965. As such, the complaint became a non-starter. During their submissions reference was made to the subsequent conduct of the company in giving a loan of RM60,000 or RM80,000 to 555 Capital Sdn Bhd, which was

not part of the petitioner's pleaded case. As such, I took the view that that cannot be taken into consideration in determining the issue of oppressive conduct.

OPERATING AND ADMINISTRATIVE COSTS

[137] Now, in so far as incurring huge operating costs and administrative expenses one must take into account the fact that the company has made profits, has increased the share value of its shareholders and is owning valuable assets. And so, by no means can there be any suggestion that there is dissipation of assets or anything close to that kind of allegation.

[138] And if it is being suggested that the payment of huge amounts of salary to the GM is unreasonable or it is sinister, then, there must have some smoking gun evidence to show that the second respondent was lining his pocket by paying this person and maybe rerouting this money back into his pocket. There is no such evidence and no such suggestion. All that is being suggested is that, there is a huge amount being paid to the GM but that is a management decision which is a decision taken by the board of directors.

[139] In *Low Tien Sang & Sons Holdings Sdn Bhd v How Kem Chin* [2000] 2 MLJ 334 the court held that decisions such as the amount of rental to charge or the amount to pay as salaries are all management decisions which are almost always immune from review by a court as the court ought not to interfere or second guess bona fide management decisions, unless it can be shown that these decisions were all part of a sinister plot to dissipate the assets of the company and line the pockets of the directors. The general rule is that internal management decisions and those that are put in place as a result of resolutions passed by a properly constituted board of directors may not be impugned.

[140] Likewise, it is my view that the court cannot and ought not to sit in judgment over management decisions and decide for management as to what should be emolument for the GM or the rental value or whether it was proper for management to have engaged the services of a real estate agent and pay him commission to negotiate with the existing tenant.

[141] In this regard, there was a suggestion by counsel for the petitioner during submissions that the directors should have themselves negotiated with the existing tenant which would have enabled the company to save on the commission payable to the agent/broker. Again, that is a management decision. They preferred to leave it in the hands of an estate agent or broker to procure the continuity of tenancy of the existing tenant. That is well within the scope

of management's decision to leave it to a broker and pay the broker the appropriate commission, bearing in mind, that the company was getting a huge rental income in return.

[142] So, the mere fact that there are huge expenses must be taken in the context of how the company's assets have been acquired and have improved the share value of the petitioner and that of all the other shareholders as well.

[143] It is also significant that the second respondent gave up part of his share entitlement and thereby increasing the number of shares in the hands of the petitioner. So, that in itself shows some good faith on the part of the second respondent. The fact that second respondent refused to go through with the deal with the petitioner in the draft sale and purchase agreement, is neither here or there.

[144] As was rightly pointed out by the respondents' counsel, the second respondent had executed the agreement but the petitioner did not want to go through with the deal. In any event, it was entirely a private transaction between the two parties. That in and of itself cannot be a manifestation of oppressive conduct by the second respondent.

[145] So, in all the circumstances, it is my view that majority rule prevails. In coming to that conclusion I am merely applying the principle in *Re Kong Thai Sawmill (Miri) Snd Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227. No doubt the petitioner is in the rather invidious predicament of being 'locked' in the company where it has valuable assets in the form of landed property which is and/or will yield income, without the shareholders deriving any dividend income.

[146] Next, of course it was suggested in submission that the company's position could be even better if the expenses were not as high as it is now. In this regard, I quote counsel for the petitioner who said, 'company's performance should be better than what it is. Even though the value of the company – has appreciated, I say that the huge administrative expenses has caused the company's performance to be affected in the sense that cash flow is very little despite collecting rental of RM120,000 per month with zero activity. The company's balance sheet should be looking much much better than what it is now'.

[147] In my view, that most certainly cannot be a ground for complaint of oppressive conduct and as long as it is demonstrated that the management of the company is being run in a way that actually shows that the assets are being acquired, monies are being invested wisely as seems to be the case here, then the conduct of those having control of the company cannot be impugned. The

management of the company in the hands of the second respondent has without doubt resulted in an appreciation of the share value of all shareholders including that of the petitioner.

[148] Counsel for the petitioner says that no great managerial skill or effort is required merely to invest in property and to collect the income that the property yields. That is easier said than done. Whatever the reservations that the petitioner may have, it cannot be doubted that whatever decision that is or has to be made, involves some managerial or business judgment and it is that judgment which has to be respected, unless there is some sinister or vitiating fact or circumstances as may impel this court to impugn the decision of the controlling party as being oppressive or unfairly prejudicial to the petitioner.

[149] But on the other hand, the respondents are saying that the petition was filed for a collateral purpose. Counsel relied upon *Re Bellador Silk Ltd* [1995] 1 All ER 667 and submitted that this petition was filed for a collateral purpose, which is to put pressure on the second respondent to buy out petitioner's share. I declined the invitation to make or draw such an inference as it is difficult for me to make such an assumption or inference because of the principle enunciated in the case of *Re Smith and Fawcett Ltd* [1942] Ch 304 where it was said by Lord Greene MR that inferences of mala fides cannot be determined based on averments made in affidavits. It may have been otherwise if there was cross-examination of the deponent.

[150] This brings me to the issue as to how this case was handled. Since there has been no cross-examination of either the petitioner or the second respondent (although an attempt to was made, after the case had started and I refused to allow the attempt to cross-examine or to re-open the case by introducing fresh evidence in relation to the genesis of the loan), the end result is that the case was based entirely on affidavit averments.

[151] Ultimately, I had to decide this case based on the principle in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 which is that the court in a petition such as this has to decide based on the materials that are placed before the court and to deal with the undisputed facts or those facts which are not credibly denied.

[152] And based on what I had before me and upon applying the principles that may be culled from the cases set out above, I came to the conclusion that a case for oppression or unfairly prejudicial conduct, had not been made out under s 181 of the Companies Act 1965. And so for those reasons, I dismissed the petition. Enclosure (1) was therefore dismissed with costs of RM18,000 to be paid by the petitioner to the respondents.

A *Petition dismissed.*

Reported by Ashok Kumar

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